

**Kang Wah Construction Sdn Bhd v
Chan Ai Min Property Sdn Bhd & Anor**

HIGH COURT (KUCHING) — SUIT NO KG 22-03 OF 1999-III/I
IAN CHIN J
24 SEPTEMBER 1999

Civil Procedure — Winding up — Liquidators — Liquidators appointed advocate without authority of court or committee of inspection — Whether absence of such authority render action incompetent — Companies Act 1965 s 236(1)(e)

On 5 August 1999, the deputy registrar dismissed the application of the plaintiff for attachment of five properties under s 19 of the Debtors Act 1957. The learned deputy registrar dismissed the application solely on the ground that the firm of advocates, M/s Teo Sehom Tan Madhi, who appeared for the plaintiff company under liquidation was appointed by the liquidator without the authority of the court or committee of inspection which is required by s 236(1)(e) of the Companies Act 1965 ('the Act').

Held:

- (1) The defendants being third parties in so far as the plaintiff company in liquidation is concerned cannot take the objection that the authority of the court or the committee of inspection has not been obtained (see p 265B-C).
- (2) The power to commence an action under s 236(2)(a) of the Act must necessarily include the power to appoint an advocate for that purpose (see p 265H); *Selvam Holdings (M) Sdn Bhd v Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor* [1995] 1 AMR 139 followed. Even assuming that the court's authority is required, the absence of such an authority does not render the action incompetent nor the advocate lacking locus standi since he was appointed by the liquidator and the lack of the authority of the court or committee of inspection only goes towards the question of whether the liquidator is entitled to costs out of the estate or that he should personally bear the costs (see p 267A-C).
- (3) A case for attachment had been made out in respect of one property that was about to be sold. As for the rest of the properties, they were charged to the other defendant and the court is unable to see how the order can prevent the bank from exercising its right under the charge (see p 267E-H).

[Bahasa Malaysia summary]

Pada 5 Ogos 1999, timbalan pendaftar telah menolak permohonan plaintif untuk penahanan lima bidang tanah di bawah Akta Penghutang 1957. Timbalan pendaftar yang arif telah menolak

A permohonan tersebut atas dasar bahawa firma guaman, Tetuan Teo Sehom Tan Madhi yang telah mewakili syarikat plaintif yang di bawah penyelesaian telah dilantik oleh penyelesaian tanpa kuasa mahkamah atau jawatankuasa menyiasat seperti yang diperlukan oleh s 236(1)(e) Akta Syarikat 1965 ('Akta tersebut').

B **Diputuskan:**

(1) Defendan yang merupakan pihak ketiga sejauh berkenaan dengan syarikat plaintif yang dalam penyelesaian tidak boleh membantah bahawa kuasa mahkamah atau jawatankuasa menyiasat belum lagi diperolehi (lihat 265B–C).

C (2) Kuasa untuk memulakan tindakan di bawah s 236(2)(a) Akta tersebut mestilah termasuk kuasa untuk melantik peguam untuk tujuan tersebut (lihat ms 265H); *Selvam Holdings (M) Sdn Bhd v Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor* [1995] 1 AMR 139 diikuti.

D Jikalau diandaikan yang kuasa mahkamah diperlukan, ketiadaan kuasa tersebut tidak menjadikan tindakan tersebut tidak kompeten atau peguam kurang locus standi oleh kerana beliau telah dilantik oleh penyelesaian dan kekurangan kuasa mahkamah atau jawatan kuasa menyiasat hanya membangkitkan persoalan sama ada penyelesaian adalah berhak kepada kos daripada estet atau beliau terpaksa membayar kos sendiri (lihat ms 267A–C).

E (3) Suatu kes untuk penahanan hanya telah dibuktikan berkenaan dengan sebidang tanah yang akan dijual. Bagi tanah-tanah yang lain, ia telah digadaikan kepada defendan yang lain dan mahkamah tidak dapat lihat bagaimana perintah tersebut boleh menghalang bank tersebut daripada melaksanakan hak di bawah gadaian tersebut (lihat ms 267E–H).]

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Notes

G For cases on liquidator, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 745–766.

Cases referred to

Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor [1993] 1 MLJ 119 (refd)

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Brown; ex parte; Re Smith (1886) 17 QBD 488 (refd)

Dublin City Distillery (Great Brunswick Street, Dublin) Ltd & Anor v Doherty [1914] AC 823 (refd)

Maiko Woods Maritime & Properties Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd [1998] 4 MLJ 395 (refd)

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Selvam Holdings (M) Sdn Bhd v Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor [1995] 1 AMR 139 (folld)

Legislation referred to

Companies Act 1965 s 236(1)(e), (2), (3)
Companies Act, 1948 s 245 [Eng]
Debtors Act 1957 s 19

Polycarp Teo Sehom (Teo Sehom Tan & Madhi) for the plaintiff.
Sheena Chuah (Battenberg & Talma) for the first defendant.
Lim Lip Sze (Reddi & Co) for the second defendant.

Ian Chin J:*Introduction*

This is an appeal by Kang Wah Construction Sdn Bhd, which is in liquidation, against the decision of the deputy registrar who had on 5 August 1999 dismissed the application of the plaintiff for attachment of the properties under s 19 of the Debtors Act. The learned deputy registrar dismissed the application solely on the ground that the firm of advocates, M/s Teo Sehom, Tan Madhi, who appeared for the Plaintiff company under liquidation was appointed by the liquidator without the authority of the court or committee of inspection which is required by s 236(1)(e) of the Companies Act, 1965 ('the Act'). This objection was taken by the defendants Chai Ai Min Property Sdn Bhd and Pacific Bank Bhd.

The law

The first question that comes to mind is why should the defendants be allowed to raise such a point? *Buckley on the Companies Act* (13th Ed) at p 517 has this to say:

The defendant to proceedings brought by the liquidator in the name of the company cannot take the objection that the sanction of the Court has not been obtained.

The case relied on as supporting that proposition of law is *Dublin City Distillery (Great Brunswick Street, Dublin) Ltd & Anor v Doherty* [1914] AC 823 where, inter alia, the court considered s 151 of the Companies (Consolidation) Act 1908 which enables a liquidator, in the case of a winding-up in Ireland, to bring or defend legal proceedings with the sanction of the court. The sanction was not obtained but the court held that the section does not confer on third parties any right to object to proceedings brought by a liquidator in the name of the company on the ground that no such sanction has been obtained. In that case, a plaintiff lent to a company various sums of money secured by a second series of debenture and also purportedly secured by stocks of whisky. The company had earlier issued a first series of debenture under which Cox acted to appoint a liquidator in the winding-up of the company. The assets were not sufficient to satisfy all the debenture holders of the second series of debenture and thus prompting the plaintiff to claim a right over the stock of whisky in priority over the second debentures. The claim was resisted by the liquidator. The High Court and Court of Appeal found for the plaintiff. The

- A liquidator appealed despite leave being refused by the court. The House of Lords reversed the decision and held, *inter alia*, that leave is not a necessary preliminary but that the liquidator can always appeal at the peril, if unsuccessful, of being deprived of his costs.

- B Though that case dealt with the sanction for an appeal the law is no less applicable concerning the initiation of an action since it involves the interpretation of a provision dealing with obtaining sanction. Therefore, though the authority to appoint an advocate was not obtained, it does not mean that the action is incompetent. I would also follow that decision to hold that the defendants being third parties in so far as the plaintiff company in liquidation is concerned cannot take the objection that the authority of the court or the committee of inspection has not been obtained.

- C That decision was notwithstanding the fact that under s 245 of the English Companies Act 1948, the power to bring or defend any action or other legal proceeding in the name and on behalf of the company and to appoint a solicitor to assist him in the performance of his duties shall only be exercised with the sanction of either the court or the committee of inspection. Thus, in England, an action commenced by an advocate upon the instruction of a liquidator is not invalid as to justify it being struck out notwithstanding that the prior sanction of the court has not been obtained. Therefore, even less so in the case of an action commenced by an advocate instructed by a liquidator whose appointment was without the sanction of the court or the committee of inspection but which action can be commenced without the sanction of the court or the committee of inspection.

- D A fortiori in Malaysia where s 236 of the Malaysian Companies Act 1965 allows a liquidator to bring or defend any action or other legal proceeding in the name and on behalf of the company without the need to apply for the authority of the court or committee of inspection to do so.

- E Such a decision stands to reason as otherwise it would work injustice. Take for instance a liquidator immediately upon assuming office discovered that a suit had to be commenced to recover a debt if it is not to be caught by the statute of limitation. In order to commence an action the liquidator would have to engage an advocate and do so immediately. To interpret the provision as requiring the sanction first or else it would be illegal would mean defeating the right of the company and the duty of the liquidator to recover the assets as it would not be possible to apply for such sanction in time to save the cause of action. Another approach which I would adopt is that taken by Abdul Aziz J in *Selvam Holdings (M) Sdn Bhd v Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor* [1995] 1 AMR 139 where the learned judge held that the power to defend an action under s 236(2)(a) of the Act, which I would add the power to commence an action as well, must necessarily include the power to appoint an advocate for the purpose.

- G H I It does not follow that such an interpretation would leave the liquidator to act in any manner he likes with regard to litigation. He is still subject to the sanction of costs because though costs are normally paid out of the

estate of the company but costs improperly incurred may be disallowed (*Ex parte Brown; Re Smith* (1886) 17 QBD 488). Furthermore, the liquidator is still subject to the control of the court under s 236(3) of the Act which is in the following terms:

The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

In the course of the argument, I had been referred to *Maiko Woods Maritime & Properties Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd* [1998] 4 MLJ 395 which dealt with a firm applying to represent and defend a company in liquidation but it did not exhibit the consent of the liquidator. Obviously, the power is conferred on the liquidator not on the law firm to apply for authority to appoint an advocate. The present case is not concerned with such a situation. Another case referred to is *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119 which considered s 236(1)(e) and James Foong J there, at p 126, said this:

One further point that arose during the course of trial is the allegation that Mr Ong Ban Chai, counsel for the liquidator, had no locus standi in these proceedings under s 236(1)(e) of the Act. Further, the actions of the liquidator in bringing this motion to court is void under s 236(2) and (3) of the Act.

Section 236(1)(e) of the Act states as follows: 'The liquidator may with the authority either of the Court or of the committee of inspection appoint an advocate to assist him in his duties.'

There is no evidence of such authority granted by the court or by the committee of inspection. Mr Ong Ban Chai of course argued that though the court's permission was not obtained, the committee of inspection could grant such authority. This, to him, should be an internal affair of the company. I cannot accept this contention in the absence of any evidence to show that the committee of inspection has granted such authority. Section 236(1)(e) of the Act clearly lays down such a requirement and when challenged, proof must be tendered that such authority does exist and not just by a mere wave of the hand to dismiss it as an internal arrangement.

As for s 236(2) of the Act which involves various activities of the liquidator in carrying out his duties to wind up the affairs of the company and distribute its assets, the court shall as provided by s 236(3) of the Act have only a control over such matters. 'Control' unlike 'authority' as stated in s 236(1) of the Act is that it can commence but subject to the approval of the court. As for 'authority', one cannot even begin to commence unless authority or permission is granted. As for this contention, I find that the acts of the liquidator in bringing this motion to court is not void under s 236(2) and (3) of the Act but, the appointment of Ong Ban Chai as an advocate to assist the liquidator is.

Based on the reasons stated aforesaid, I dismissed the liquidator's motion with costs.

I would respectfully disagree with that decision for the following reasons: (1) the third parties Malayan Banking Bhd and another in that case should

- A** not be heard to say no authority was obtained (*Buckley On The Companies Act*, 13th Ed at p 517); (2) no such authority is required (*Selvam Holdings (M) Sdn Bhd v Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor*); and (3) even assuming that the court's authority is required, the absence of such an authority does not render the action incompetent nor the advocate lacking locus standi since he was appointed by the liquidator and the lack of the authority of the court or committee of inspection only goes towards the question of whether the liquidator is entitled to costs out of the estate or that he should personally bear the costs (*Dublin City Distillery v Doherty*).
- B**

- C** There was another alternative for the liquidator which was to apply for a blanket order from the court but though the English court had granted such an order before, it was also frowned upon since such a blanket order would render the supervisory function of the court more illusory than true.

The merit

- D** In so far as the defendant Chai Ai Ming Property Sdn Bhd is concerned, it did not seriously argue that an attachment should not be issued as the plaintiff had provided evidence that the said Defendant is going to dispose of its properties. In fact by the time of the hearing of this appeal, the said defendant had out of five properties sought to be attached managed to dispose of one of the properties while another was in the process of being disposed of. I am of the view that a case for attachment had been made out but only in respect of one property that was about to be sold and hence I made the following order:
- E**

- F** An order is made attaching the property described in Lot 736 Section 64 Kuching Town Land District provided that if the first defendant shall have already entered into an agreement disposing of the property, only the proceeds of the sale shall be attached and for this purpose the first defendant is ordered to pay into court within 24 hours of the receipt of the proceeds pending the disposal of the action herein. All sums deposited with the court shall be placed on fixed deposit with any financial institution in the name of the deputy registrar.

- G** As for the rest of the properties, they were charged to the other defendant Pacific Bank Bhd and I am unable to see how I can issue an order which has the effect of preventing that bank from exercising its right under the charge. I therefore refused that application.

Order accordingly.

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Reported by Benjamin Yong

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